87-839

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

Misc. No. _____

DERRICK DAMON ELDRIDGE - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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November 11, 1987

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QUESTION PRESENTED

The Decision of the Court of Appeals of Kentucky Which the Supreme Court of Kentucky Declined to Review That the Petitioner Had Been Granted a Fair Trial Even Though He Was Denied the Right to Fully Cross-Examine His Accuser, Was the Object of Suggestive In-Court Identification and Potentially Exculpatory Evidence was Willfully Suppressed by Police Officials Is In Conflict With Prior Decisions of This Court and Raises a Federal Constitutional Question of Importance to the Administration of Criminal Justice.

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IN THE

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October Term, 1987

Misc. No. _____

DERRICK DAMON ELDRIDGE - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

The Petitioner, DERRICK DAMON ELDRIDGE, prays that a Writ of Certiorari issue to review the Opinion of the Court of Appeals of Kentucky rendered on August 7th, 1987, which the Supreme Court of Kentucky declined to review on September 15th, 1987.

OPINION BELOW

The Opinion of the Court of Appeals of Kentucky was rendered on August 7th, 1987, and is unreported. The Petitioner's timely Motion for the Supreme Court of Kentucky to review said Opinion was denied on September 15th, 1987. A copy of the decision of the Court of Appeals of Kentucky and the Order denying the Motion for Discretionary Review are contained in the Appendix hereto.

JURISDICTION

The Order of the Supreme Court of Kentucky denying the Petitioner's Motion for Discretionary Review was entered on September 15th, 1987. This Petition for Writ of Certiorari was filed within sixty (60) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this petition are the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The Petitioner was jointly indicted with a Lawrence Sanners and a Tracy Lynn Keye on November 5th, 1985, on one (1) count of sodomy in the first degree in violation of KRS 510.070. (Transcript of Record, hereinafter designated TR, pp. 1-2). Prior to the Trial, Tracy Lynn Keye and Lawrence Sanners each entered a plea of guilty to a lesser charge and each was sentenced to five (5) years imprisonment. (Transcript of Evidence, hereinafter designated TE, pp. 102-3 and 133-4). Contrary to his plea, the Petitioner, on February 25th, 1986, was found guilty by a jury on the offense of sodomy in the first degree. (TE, p. 236). A final judgment of conviction was entered on June 9th, 1986, sentencing the Petitioner to ten (10) years imprisonment (TR, pp. 73-74), and

the Notice of Appeal was filed on the same day. (TR, p. 76).

In the Opinion of August 7th, 1987, the Court of Appeals of Kentucky affirmed the Petitioner's conviction determining that no reversible error had been committed. The Petitioner timely filed a Motion for Discretionary Review of the intermediate appellate court decision which was denied on September 15th, 1987.

STATEMENT OF FACTS

Derrick Damon Eldridge had been talking with his friends, Lawrence Sanners, Tracy Keye, Louis Armstead and Ivory McFarland, on a street corner in a predominantly poor neighborhood in Henderson, Kentucky during the middle evening hours of Monday, September 16th, 1985. One of the group, Lawrence Sanners, accosted a young female passerby, Susan Groves, and escorted her into an alleyway and beckoned his friends to join him. All of the youths, including Ms. Groves, had been drinking beer in varying quantities. Two of these individuals, Messrs. Keye and Eldridge, joined Mr. Sanners and Ms. Groves, who held herself to be older than she was in fact! Messrs. Sanners and Keye used violence and/or threats of violence to coerce Ms. Groves into performing oral sodomy on them. Upon seeing this, Mr. Eldridge left. (TE, pp. 174-181).

Later that evening, Ms. Groves reported the incident to the Henderson Police Department. (TE, pp. 32-33).

Ms. Groves gave several versions of the incident which differed with the number of participants involved. (TE, p. 82). In a written report which the police failed/refused to produce (see Petitioner's Motion for New Trial, TR, pp. 45-63), despite Petitioner's discovery motions and the Trial Court's Discovery Order, (TR, pp. 5-9, 13 & 27, respectively), the purported victim corroborated the Petitioner's version of the events of September 16th, 1985!

Ms. Groves never positively identified Mr. Eldridge as one of the alleged assailants prior to Trial, at which time she pointed to a black male spectator when asked by the prosecutor to identify Mr. Eldridge. At this time, the prosecutor walked behind Mr. Eldridge at the defense table and asked her to again identify the alleged third assailant at which time she pointed to the Petitioner. (TE, pp. 30-32; pp. 80-82).

During the Trial, during direct examination by the prosecutor, Ms. Groves, the alleged victim, stated that her mother didn't like her to be with "black guys" and when the Defense Counsel sought to explode potential bias and motive as grounds for impeachment, the prosecutor objected alleging that such questioning was violative of the Rape-Shield Law (KRS 510.145) and the Trial Court sustained that objection without allowing Defense Counsel the opportunity to explain that he was not attempting to explore any "prior sexual

conduct" but rather bias and/or motive for testimony. (TE, pp. 43-44).

The Petitioner was found guilty by the jury of sodomy in the first degree and recommended imprisonment for a period of ten (10) years. (TE, p. 236).

After the verdict, while Defense Counsel was retrieving personal items from a waiting room near the Courtroom, he found a police report which contained a version of the victim's statement taken immediately after the alleged incident which supported the Petitioner's contention that he had left the scene before any action by Messrs. Sanners and Keye to/with Ms. Groves, stuffed in a garbage can. Motions for new trial based on this discovery were filed and summarily overruled by the Trial Court. (TE, pp. 241-247).

REASON FOR GRANTING THE WRIT

The Decision of the Court of Appeals of Kentucky Which the Supreme Court of Kentucky Declined to Review That the Petition Had Been Granted a Fair Trial Even Though He Was Denied the Right to Fully Cross-Examine His Accuser, was the Object of Suggestive In-Court Identification and Potentially Exculpatory Evidence was Willfully Suppressed by Police Officials Is In Conflict with Prior Decisions of this Court and Raises a Federal Constitutional Question of Importance to the Administration of Criminal Justice.

At no time during the investigative or pre-trial phases herein had the alleged victim positively identified the Petitioner as one of the purported assailants.

When asked by the prosecutor if one or more of her assailants was present in the Courtroom, over Defense

objection to the question, Ms. Groves answered in the affirmative and pointed into the spectator area beyond the bar. The prosecutor moved behind the defense table while describing the Petitioner by his attire, over defense objection, and asked her to again identify Mr. Eldridge, at which time she pointed to the Petitioner, the only black male at the defense table and within the bar-well of the Courtroom. (TE, pp. 30-31).

Ms. Groves only knew the Petitioner's name because it had been supplied to her by a third person who was not a witness to the events in question. (TE. p. 36).

The investigating officer, Officer Todd, attempted to ascertain the identity of Ms. Groves' alleged attackers by showing her pictures in local high school yearbooks, but she was unable to identify anyone. She never made positive identification of Derrick Damon Eldridge — either from the yearbooks or in person. (TE, p. 80).

When an identification is challenged on the basis that the prosecutor created impermissibly suggestive circumstances, which posed a substantial likelihood of irreparable misidentification, courts, as required by *Neil* v. *Biggers*, 409 U. S. 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1973), engage in a two-step analytical process to decide whether the identification evidence is admissible. The initial inquiry determines whether the circumstances were impermissibly suggestive; if so, the Court determines whether that suggestiveness had an effect on the reliability of the identification by ascertaining whether it was nonetheless reliable. Such inquiry was *not* conducted by the Trial Court herein.

In a case in which the witness was shown the Defendant in a line-up and was unable to identify him as the robber, but later after seeing him in Court at a preliminary hearing and at trial at which point she was able to identify said Defendant, the Sixth Circuit, in *Thigpen* v. *Cory,* 804 F. 2d 893 (6th Cir. 1986), found that the undue suggestiveness of the circumstances tainted the ultimate identification, and that no harmless error had occurred.

A rape victim's identification of the Defendant at a preliminary hearing was held by the Seventh Circuit in *Love* v. *Young,* 781 F. 2d 1307 (7th Cir. 1986), to have involved impermissibly suggestive circumstances because the Defendant was the only black person in the courtroom at the time.

It should be noted that in the case-at-bar, there had been no pre-trial identification of the Petitioner by the alleged victim to support her in-Court "corrected" identification!

During the cross-examination of the alleged victim, after her "corrected" in-Court identification of the Petitioner, Defense Counsel sought to explore her bias in testifying against the Petitioner and the motivation behind said testimony as told by the witness during direct examination, to-wit: her mother didn't like for her to be with "black guys." All of her alleged assailants were black males. Could fear of her mother's approbation influence her testimony against the Petitioner? In said direct examination she had stated that her mother would put any black males she found with her in jail. (TE, p. 22). Defense Counsel was pre-

cluded from this element of confrontation when the prosecutor objected invoking Kentucky's Rape Shield law, KRS 510.145, which prohibits exploration of a victim's prior sexual history. The Trial Court, without exploring the line of questioning which Defense Counsel sought to investigate, sustained the objections. (TE, pp. 43-44).

This Court, in *Davis* v. *Alaska,* 415 U. S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), has held that bias and/or motive of a witness for his or her testimony is clearly proper grounds for impeachment. The denial of the right to show such potential bias was characterized by this Court as a constitutional error of such magnitude as could not be cured by a showing of no prejudice. See *Davis, supra.*

By Motion for Omnibus relief under the discovery provisions of the Kentucky Rules of Criminal Procedure, filed by the Petitioner's Defense Counsel on/about November 19th, 1985, Petitioner sought to discover, *inter alia,* "any reports containing statements and/or evidence exculpatory in nature or favorable to the Defendant." (TR, p. 7). The Trial Court sustained that Motion. (TR, p. 13).

On January 31st, 1986, prior to the Trial which commenced on February 25th, 1986, the Petitioner filed an additional Motion for Discovery, which was sustained.

On February 25th, 1986, Officer Todd testified on behalf of the Commonwealth. He stated that he had Ms. Groves' statements available to him. (TE, pp. 81-82). In fact, the prosecution had provided the Peti-

tioner a copy of a statement by Ms. Groves which was incriminatory of the Petitioner! A copy of Uniform Offense Report #0158801, dated 9/17/85 and compiled by members of the Henderson Police Department, to include Officer Todd, the investigating officer, which report contained a supplemental report of statements by Ms. Groves which were favorable to the Petitioner in that it substantiated his contention that he had left Ms. Groves with Messrs. Sanners and Keye, the confessed attackers, before any sodomy had been committed, was not produced. In that report it is stated that Ms. Groves said that only two (2) men had assaulted her. (TR, pp. 45-63).

Upon leaving the Courtroom after the Trial, Defense Counsel found said report in a garbage can in a room formerly occupied by Officers Todd and Richs of the Henderson Police Department during the Trial. Based on this newly discovered evidence which also represented a violation of the rules of criminal procedure and of the Trial Court's Discovery Order, Defense Counsel filed a Motion for a new trial. (TR, pp. 45-63). On June 9th, 1986, Defense Counsel argued said Motion before the Trial Court which summarily overruled it (TE, pp. 24-247), and later formalized its ruling by an Order overruling it. (TR, pp. 71-72).

In the landmark case of *Brady* v. *Maryland,* 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), this Court ruled that to withhold evidence favorable to the accused is a violation of the due process clause of the Fourteenth Amendment without regard to whether such evidence was withheld in good faith or in bad

faith. The *Brady* case strictly held that the prosecution could not hold favorable evidence that would tend to exculpate the accused or would bear upon his degree of punishment, if such conformation had been requested by the accused prior to trial.

The Petitioner herein had requested said document; the prosecution, through its agents, knew, or should have known, of its existence; and yet another contradictory statement by the alleged victim as to the number of assailants would clearly tend to exculpate the Petitioner.

Kentucky clearly follows the *Brady* rule. In *Timmons* v. *Commonwealth,* Ky., 555 S. W. 2d 234 (1977), the Kentucky Supreme Court held that "withholding by the state of information which 'created a reasonable doubt that would not otherwise exist' is a denial of due process, regardless of good faith on the part of governmental authorities responsible for the suppression."

CONCLUSION

Three (3) separate and distinct acts by the prosecution have violated the Petitioner's right to a fair trial as constitutionally mandated. Contrary to the decisions of this Court, the Supreme Court of Kentucky and the Kentucky Court of Appeals have endorsed this situation. This important constitutional question in the administration of criminal justice justifies the grant of certiorari to review the decisions below.

Respectfully submitted,

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IN THE

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October Term, 1987

Misc No. _____

DERRICK DAMON ELDRIDGE - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

CERTIFICATE OF SERVICE

I, F. R. RADOLOVICH, Counsel for the Petitioner, hereby certify that copies of this Petition for Writ of Certiorari and Notice of Appearance was served by mailing, U.S. postage prepaid, this 11th day of November, 1987, upon: Hon. David L. Armstrong, Attorney General, Capitol Building, Frankfort, Ky. 40601 (3 copies); Clerk, Kentucky Court of Appeals, 403 Waping Street (Bush Bldg.), Frankfort, Ky. 40601; Clerk, Henderson Circuit Court, Henderson, Ky. 42420; Clerk, Kentucky Supreme Court, Capitol Building, Frankfort, Ky. 40601; Hon. Carl D. Melton, Judge, Henderson Circuit Court, Henderson, Ky. 42420; and Hon. William F. Polk, Jr., Asst. Commonwealth Atty. 210 Third Street, Henderson, Ky. 42420.

Respectfully submitted,

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v.

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NOTICE OF APPEARANCE

The Clerk will enter my appearance as Counsel for the Petitioner. I certify that I am a member of the bar of the United States Supreme Court. The Clerk is requested to notify the undersigned of action by the Court by regular mail.

Respectfully submitted,

RADOLOVICH, HARRINGTON & LEVY, PSC.

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APPENDIX

SUPREME COURT OF KENTUCKY

87-SC-624-D
(86-CA-1459-MR)

DERRICK DAMON ELDRIDGE - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

Henderson Circuit Court
No. 85-CR-146

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED September 15, 1987.

(s) Robert F. Stephens
Chief Justice

OPINION RENDERED: August 7, 1987; 10:00 a.m.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 86-CA-1459-MR

DERRICK DAMON ELDRIDGE - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Henderson Circuit Court
Honorable Carl D. Melton, Judge
Action No. 85-CR-146

AFFIRMING

BEFORE: COOPER, HOWARD, AND MILLER, JUDGES.

COOPER, JUDGE. This is an appeal from a judgment convicting the appellant, Derrick Damon Eldridge, of first-degree sodomy and sentencing him to ten years' imprisonment. On appeal, the principal issues are whether the trial court erred in: (1) allowing the Commonwealth, during its opening statement, to raise allegations of a crime for which the appellant was not indicted; (2) invoking the provisions of the Rape Shield Law, KRS 510.145; and (3) refusing to grant a motion for a new trial on the basis that the Commonwealth concealed documents discoverable under RCR 7.24 and RCR 7.26. Reviewing the record below, we affirm.

The essential facts giving rise to this appeal are as follows: In November of 1985 the appellant was indicted for first-degree sodomy, KRS 510.070, as a result of a sequence of events in the evening hours of September 16,

1985. Specifically, on the evening in question, the victim, Susan Groves, was accosted in a neighborhood by three black men, forced into an alley where she was forced to commit fellatio or oral sodomy upon them. At the time of the assault, the victim was fourteen years of age. Although the appellant alleged that he was an observer rather than a participant, two of the three men involved confessed to their participation in the crime and inculpated the appellant as well. Subsequent to a trial by jury the appellant was found guilty of first-degree sodomy and sentenced to ten years' imprisonment. It is from such judgment that he now appeals.

Initially, the appellant argues that the trial court committed reversible error in permitting the Commonwealth, during its opening statement, to make reference to a crime not alleged in the indictment. Specifically, the Commonwealth made reference in its opening statement to an attempted rape of the victim by the appellant. He argues that such went beyond the scope of RCR 9.42(a) and was designed to incite or inflame the jury. Notwithstanding the appellant's argument, we cannot say the trial court committed reversible error in permitting the Commonwealth to make such a comment.

Here, the attempted rape on the part of the appellant of the victim was part of the whole sequence of events during which the victim was sodomized. Specifically, the testimony established that at the time she was forced to sodomize two of the three attackers the appellant attempted to engage in intercourse with her from the rear. Given the fact that such attempted rape occurred contemporaneously with the alleged acts of sodomy, we cannot say that the trial court erred in allowing the Commonwealth to make reference to it. See *Caldwell* v. *Commonwealth*, Ky., 503 S. W. 2d 485 (1972); *Ware* v. *Commonwealth*, Ky., 537 S. W. 2d 174 (1976). Stated differently, in that the alleged

attempted rape was part of a single transaction, the trial court did not err in allowing reference to be made to it.

Secondly, we reject the argument that the trial court erred in invoking the provisions of KRS 510.145, the Rape Shield Law, in limiting the cross-examination of the victim. Specifically, the trial court sustained an objection to a line of questioning concerning whether the victim had "been with" black men prior to the night of the attack. Such testimony would have gone to her prior sexual history and would have been barred under the provision of KRS 510.-145. Furthermore, the excluded testimony was irrelevant given the overwhelming evidence that the victim had been abused sexually as well as physically. Consequently, the trial court acted correctly in this respect.

Finally, we find no merits in the trial court's refusal to grant the appellant a new trial on the basis that the Commonwealth had concealed police reports discoverable under the provisions of RCR 7.24 and RCR 7.26. Although the appellant argues that the Commonwealth failed to produce an alleged statement of the victim pursuant to a pre-trial discovery order, the record discloses that the statement in question was merely a summary by a police officer of what the victim had initially stated. Furthermore, read as a whole, the report was, in no significant way, inconsistent with the victim's testimony at trial or with her taped pre-trial statement. Stated differently, the police officer's summary of what the victim had told him was in no way exculpatory.

And, we reject the argument that the trial court erred in allowing the victim to conduct an in-court identification of the appellant. Although the appellant argues that the victim failed to identify him in this in-court identification, the record reveals that she did, in fact, identify him rather than a spectator at this time. More importantly, the question of the appellant's identity was not really an issue given

the fact that two of the attackers identified him as one of the parties committing the crime. We find no error in this respect.

The judgment of the trial court is affirmed.

ALL CONCUR.

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KENTUCKY PENAL CODE

510.145. Inadmissibility of evidence of prior sexual conduct or habits of complaining witness — Exception — Procedure for admission. — (1) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to the provisions of this section.

(2) In any prosecution under KRS 510.040 through 510.140, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of these sections, reputation evidence, and evidence of specific instances of the complaining witness' prior sexual conduct or habits is not admissible by the defendant.

(3) Notwithstanding the prohibition contained in subsection (2) of this section, evidence of the complaining witness' prior sexual conduct or habits with the defendant or evidence directly pertaining to the act on which the prosecution is based, may be admitted at the trial if the relevancy of such evidence is determined in the following manner:

(a) A written motion shall be filed by the defendant with the court no later than two (2) days prior to the day of trial, or at such later time as the court may for good cause permit, stating that the defendant has an offer of relevant evidence of prior sexual conduct or habits of the complaining witness.

(b) A hearing on the motion shall be held in the judge's chambers. If, following the hearing, the court determines that the offered proof is relevant and that it is material to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall admit the offered proof, in whole or in part, in accordance with the applicable rules of evidence. (Enact. Acts 1976, ch. 144, §§ 1, 2.)